Filed 3/24/14 In re A.V. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.V., Defendant and Appellant.	G048017 (Super. Ct. No. DL043710) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheryl L. Leininger, Judge. Affirmed.

Sarita Ordonez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The Orange County Juvenile Court declared 15-year-old A.V. (born June 1997) a ward of the court (Welf. & Inst. Code, § 602) after finding she committed the felony offense of making criminal threats (Pen. Code, § 422; all further statutory citations are to the Penal Code unless noted) and obstructed a peace officer in the performance of his duties. (§ 148, subd. (a)(1)). A.V. contends there is insufficient evidence the victim suffered "sustained fear" as required by section 422. For the reasons expressed below, we affirm.

I

FACTS AND PROCEDURAL BACKGROUND

On October 8, 2012, Gilbert Rangel, a loss prevention agent at a WalMart store in Anaheim, saw A.V., two other women, and a man in the cosmetics department. Rangel watched the group because his partner suspected the women planned to steal makeup. Rangel observed the man, A.V.'s cousin Raymond A., leave the women and walk to the men's department, remove tags from a black-hooded jacket, and leave the store. The agents detained Raymond A. outside the store and escorted him into the store's security office near the store's "vestibule," the enclosed area between the exterior and the interior of the store.

A.V. entered the vestibule, banged on the door of the security office, turned the handle and started pushing the door. She screamed at Rangel and his colleagues to "let my cousin go. Let him out of there." A.V. walked outside when police officers arrived on the scene. As Rangel, stood near the exit door waiting to speak with an officer, A.V. screamed at him, "you guys are fucked up. This is a bunch of bullshit. You need to let my cousin out. You guys are fucked up. How dare you guys touch him that

way . . . . [M]y gang and I are going to come back and fuck you guys up." A.V. was standing with another woman about 10 to 12 feet away and "[h]er tone of voice was very aggressive and loud." A.V.'s threat intimated Rangel, who knew about gangs and believed that "when a gang member is assaulted or challenged in any way . . . the rest of the gang will usually retaliate with some type of violence." He feared retaliation and therefore notified one of the investigating officers.

The officers arrested A.V. and put her in a patrol car. As Rangel walked by the vehicle to hand his report to an officer, A.V. warned Rangel in a loud and aggressive tone through the passenger window, "you guys are fucked up. You'll get what's coming. I'm going to shoot your ass when I get out of here tonight." Rangel felt threatened and reported A.V.'s threats to the officers. He was concerned she might come back and harm him after she was released from custody.

Rangel is approximately six feet tall and weighed 230 pounds. He estimated A.V. was five feet eight inches tall and weighed between 150 and170 pounds. He did not have any personal knowledge A.V. was involved in a gang, although she wore a red shirt and Rangel knew some gangs wear red clothing. Anaheim has many gangs and "the store [was] located in a place where shootings or gangs are prevalent."

Officer Cory Reinmiller testified he asked A.V. about the shoplifting as they stood outside the store. She refused to cooperate and yelled and cursed at him. She began walking to the security office and refused his command to stop. It took two officers to prevent her from entering the office. As they placed her under arrest, she tried to free herself and escape. While the officers were putting A.V. in the car, she looked at Rangel and said "something about her gang coming back and assaulting" him and "I'm going to shoot your ass when I get out."

In January 2013, the juvenile court found A.V. committed the offenses listed above. The court declared her a ward of the court and placed her on probation on various terms and conditions, including 25 days service in a community work program.

II

DISCUSSION

Substantial Evidence Supports the Juvenile Court's Finding Rangel Reasonably Was in Sustained Fear for His Safety

Section 422 provides "(a) Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby *causes that person reasonably to be in sustained fear for his or her own safety* or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

To sustain a finding A.V. made a criminal threat in violation of section 422, the People were required to show: (1) A.V. willfully threatened to commit a crime that would result in death or great bodily injury; (2) she made the threat with the specific intent that it be taken as a threat; (3) the threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and (4) the threat caused the person threatened reasonably to be in sustained fear for his own safety. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.)

On appeal, we view the record in the light most favorable to the judgment below. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578 (*Johnson*).) The test is whether substantial evidence supports the verdict. (*Id.* at p. 577; *People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Substantial

evidence consists of evidence that is reasonable, credible, and of solid value. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 329 (*Sanchez*).) In a juvenile case, it is the juvenile court's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136 (*Ricky T.*).) An appellant "bears an enormous burden" in challenging the sufficiency of the evidence. (*Sanchez*, at p. 330.)

A.V. contends there was insufficient evidence her threats caused Rangel reasonably to be in sustained fear for his own safety as required by section 422. Sustained fear has been defined as fear that "extends beyond what is momentary, fleeting, or transitory." (*People* v. *Allen* (1995) 33 Cal.App.4th 1149, 1156.) A.V. argues "the only evidence underlying the element of the victim's state of mind of 'sustained fear' is [Rangel's] responding 'yes' when the prosecutor asked him if he was fearful of retaliation when [A.V.] threatened him. . . . While this testimony may have provided evidence of fear, the statute requires . . . *sustained* fear. There was no evidence that the agent felt threatened or concerned longer than even the moment he heard the statement." A.V. notes she did not display a weapon, "never touched or moved the victim in any way, and was always at least five to ten feet from the victim. The victim was physically larger and taller than [A.V.], and [the] comments occurred while police were in close proximity to the victim and/or [A.V.] was handcuffed in a police car." She emphasizes Rangel "was a loss prevention agent who was trained to routinely respond to confrontations with customers in the store."

A.V. relied in the juvenile court on *Ricky T.*, *supra*, 87 Cal.App.4th 1132. There, the minor became angry at his teacher for accidentally hitting him with a door when the teacher opened it, stating "'I'm going to get you'" (*id.* at p. 1135) or "I'm going to kick your ass" (*id.* at p. 1136). The minor did not make any physical movements or gestures toward the teacher to further the threat, and there had been no prior incidents between the pair. The teacher felt physically threatened and sent the minor to the school

office, where he received a suspension. The appellate court concluded the evidence did not show the teacher reasonably was in sustained fear for his own safety. "The phrase to 'cause[] that person reasonably to be in sustained fear for his or her own safety' has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*Id.* at p. 1140.) The court noted the teacher had no knowledge of prior threatening conduct, and "[w]hatever emotion –fear, intimidation, or apprehension [the teacher] felt during the moment of the verbal encounter, there was nothing to indicate that the fear was more than fleeting or transitory. Indeed, [he] admitted the threat was not specific. . . . [T]he police were not notified until the day after the incident. Apparently, fear did not exist beyond the moments of the encounter." (*Id.* at p. 1140; see also *id.* at p. 1141 [section 422 "not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as threats under that statute"].)[1]

A.V. also relies on *In re Sylvester C.* (2006) 137 Cal.App.4th 601 (*Sylvester C.*). There, the minor and a companion became involved in a physical altercation with a parking attendant. When the attendant threatened to call the police, the minor replied: "'If you call the police, I am going to kick your ass.'" (*Id.* at p. 604.) The attendant directed his assistant to make the call. The minor approached him and warned: "'If you call the police, I will kill you and I will kill everybody there, everybody, all the employees.'" (*Ibid.*) The minor got into his car and started to leave, but before driving away, he emerged from his car and approached another attendant. While looking at him, the minor said: "'I am going to come and get you and I am going to kill you.'" (*Ibid.*)

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[1] *Ricky T.* also held the statement was not on its face and under the circumstances an unequivocal, unconditional, immediate and specific threat which would convey to the teacher a gravity of purpose and an immediate prospect of execution. (*Ricky T., supra,* 87 Cal.App.4th at p. 1136.) A.V. does not challenge the sufficiency of the evidence on this element of the offense.

The first attendant testified he was afraid for his life and believed the minor meant what he said. Officers arrived minutes later. (*Ibid.*)

The appellate court reversed the juvenile court's finding the minor uttered a criminal threat against the second attendant who did not testify at the adjudication hearing. The court explained that without the second attendant's testimony there was no evidence he was actually in sustained fear from the minor's threats. (*Sylvester C., supra*, 137 Cal.App.4th at p. 606.) The court rejected the prosecution's argument the first attendant's testimony that "[e]verybody got scared" (*ibid.)* was sufficient to establish the second attendant suffered sustained fear, and reduced the charge to attempted criminal threats. (*Id.* at p. 607 [all elements of the crime of criminal threat established except whether second attendant actually experienced sustained fear upon hearing the threat]; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228, 231.)

Both parties rely on *People* v. *Fierro* (2010) 180 Cal.App.4th 1342. There, a disagreement between the victim and Fierro erupted at a gas station when Fierro refused to move his car. When the confrontation grew heated, Fierro lifted his shirt to display what the victim and his teenage son thought was a gun. Fierro spoke profanely and in a hostile manner, stating, "'I should kill you. I will kill you,'" and he "ought to" kill the victim's son. The incident lasted about a minute. The victim was "'scared to death during the whole ordeal'" (*id.* at p. 1346) and called 911 from the freeway about 15 minutes later, stating he was "'scared shitless.'" (*Ibid.*) The appellate court in *Fierro* held the evidence supported a finding the victim experienced sustained fear. *(Id.* at pp. 1348-1349.) The victim "testified clearly and more than once that he was horribly scared, and his fright was not fleeting." (*Id.* at p. 1348.) The "fear lasted not only through the minute or so that [Fierro] stood there exposing his weapon, but for up to 15 minutes after [the victim] drove away," and "[i]t is entirely reasonable that [the victim] would react as he did for as long as he did." (*Ibid.*) After he drove away he was still in an emotional state of fear, as "a person who hears someone say 'I will kill you . . . right

now,' coupled with seeing a weapon, is quite justified in remaining 'scared shitless' –as [the victim] put it –for 15 minutes." *(Id.* at p. 1349.) The court also held, "the minute during which [the victim] heard the threat and saw [Fierro's] weapon qualifies as 'sustained' under the statute," explaining that "[w]hen one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.'" *(Ibid.)*

Rangel's testimony he feared A.V. would carry out her threat and retaliate against him constitutes substantial evidence Rangel suffered sustained fear. The trial court reasonably could infer Rangel remained in fear during the time A.V. remained in custody and at least for a period of time after her release because she threatened to shoot him "when I get out." Rangel's fear during this time period was therefore more than the "fleeting or transitory" fear the teacher felt in *Ricky. T.* And unlike the victim in *Sylvester C.* who did not testify, Rangel's testimony supports the inference he reasonably remained in fear for a sustained period of time.

Substantial evidence also supports the trial court's finding Rangel's fear was reasonable. Unlike the vague threat the teacher received in *Ricky T.*, A.V. specifically threatened to return with her gang and shoot Rangel. Threats of gang violence would alarm most reasonable people and Rangel proved no exception. He believed her threats and feared, not unreasonably, A.V. and her gang would assault him because, as he explained, gang members "will usually retaliate with some type of violence" when a gang member has been "challenged in any way."

A.V. argues any fear Rangel may have felt was unreasonable because A.V. was in police custody when she threatened Rangel and therefore could not act on her threat, Rangel was physically larger than A.V., and received training as a loss prevention agent on dealing with hostile confrontations. These factors affect the weight of the evidence only and therefore do not establish as a matter of law the sustained fear Rangel felt was unreasonable. The juvenile court did not find these factors persuasive, and we

may not second-guess that determination. Accordingly, substantial evidence supports the finding Rangel suffered sustained fear within the meaning of section 422.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.